UNION PACIFIC-PEAVEY CONTRACT

AND THE

NEW INTERSTATE COMMERCE LAW

AN ADDRESS

BY

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AT A JOINT MEETING OF THE

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AND

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Mr. Chairman and Gentlemen of the Omaha Grain Exchange and Commercial Club:

As the new Interstate Commerce Law is about to go into effect in this country, and as it contains new and stringent provisions and heretofore unheard of penalties, and as I am one of the charter members of your Exchange, and in charge of a railroad which desires to serve you in shipping grain to other markets, I desire to speak to you of some of the provisions of this new law, so that both the shippers and the railway company may begin to "put their houses in order," to meet its provisions.

The original interstate law, passed in 1887, imposed fine and imprisonment, one or both, for certain violations of the law, upon the individual officers and agents of railway companies.

It was a law which made criminal certain acts, such as paying rebates, etc., acts which up to that time had been practiced and regarded as lawful.

Such laws, which make that criminal one day which was regarded as lawful the day before, are always difficult of enforcement. It takes years of education to make the human mind regard such acts as criminal, no matter how sound and logical the process of reasoning upon which its criminality is founded.

At that time, few, if any, of the railway officials would admit, or believed, that there was any moral wrong in paying rebates or practicing other discriminations, hence, they regarded such practices after the passage of the law as criminal only because it was made so by arbitrary statute, and not in any means binding upon their consciences. Or, in other words,

that their chances for heaven beyond the grave were just as good if they disregarded the law as if they obeyed it. And the general public regarded the statute in the same way.

Under these conditions, very little attention was, in fact, paid to the law. The paying of rebates and other discriminating practices went on as before.

The first important case which I recall was a case against Counselman & Day, in which Mr. Counselman refused to testify, because his testimony might tend to incriminate himself.

The case was taken to the courts, which sustained Mr. Counselman's position.

Then, Congress passed the law requiring such testimony to be given, but granted immunity against prosecution to those who should give such testimony. After this act, railways could pay rebates, and shippers could receive rebates with impunity, if they confessed their crimes to the Interstate Commerce Commission, or to the courts, which made it well nigh impossible to convict anyone under the law. And so the game went on.

The Elkins law, passed in 1903, abolished the penalty of imprisonment. Under this law a few convictions have recently been obtained, and the fines, ranging from $10,000 to $20,000, the limit, have been paid.

The twenty years of discussion since the passage of the first law I think I am safe in saying, has convinced the mind of the public and the courts that rebates and all kinds of discriminations are moral as well as statutory crimes. This conviction on the part of the public and the courts will render convictions much more easily obtained than heretofore.

The bill which is now pending, and will soon become the law, not only restores the penalty of imprisonment for officers and agents of the companies which pay rebates and allow other discriminations, but it has one other provision to which I call attention.

It is found in section 20 of the new law, and reads as follows:

"The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep other accounts, records or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees."

Under the decision of the United States Supreme Court in the Paper Trust Case, recently decided, these memoranda, book accounts, vouchers and all they may disclose may be used in evidence against both the company and its officers, and the individual shippers.

So, after this bill becomes law, an agent of the Commission may walk into any company's office and examine book records and memoranda to obtain evidence to be used against the company and its officers, as well as against shippers. This will make detection and proof of illegal rates and allowances of all kinds easy, because it is impossible for railway companies to pay rebates under the name of elevation, loading, or unloading charges, or otherwise, without making it clearly appear in their books.

Next to live stock, perhaps the largest product which is transported by the railways, and dealt with in Omaha, is grain. In considering the practice which has grown up in regard to paying so-called elevation charges, loading or unloading charges, or by whatever name it is called, I am convinced that the practice is entirely unlawful. That the paying of these allowances, by whatever name they are called, is paying a rebate.

Having in view the present attitude of the whole country against practices which are now in vogue, as witnessed by recent convictions, both of railway companies and shippers, and

having in view the new method of discovering and proving violations of the law, to which I have referred, an examination of the new law shows conclusively that as soon as it goes into effect the practice of returning 1¼ cents per cwt. to the shippers of grain grown west of the Missouri River must cease.

Because, one of the provisions of the new law reads as follows.

> *"No carrier shall, unless otherwise provided by this Act, engage or participate in the transportation of passengers or property, as defined in the first section of this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this section; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."*

Penalties are imposed upon the railways and the shippers.

The penalty against the railroad company for returning 1¼ cents per cwt., or any other sum, "in any manner or by any device," is a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense.

In addition, the law provides the same fine against any receiver, trustee, lessee, agent or person acting for or employed by such railroad, and, in addition to such fine, *imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment,* in the discretion of the court.

Such are the enormous penalties provided by the law against the railroad companies, their officers and agents.

The law also provides extraordinary penalties against the shipper who accepts such returns, or even solicits them. It says: "That every shipper, whether a person or a corporation, *who solicits, accepts or receives* any such rebates, concessions, or discriminations, shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of *not less than one thousand dollars nor more than twenty thousand dollars* for each offense.

In addition to these enormous fines imposed upon the shippers, the law also provides that any such shipper who receives or accepts from the railroad company any sum of money, or any other consideration, as a rebate or offset against the regular charges for transportation as fixed in the schedule of rates, shall, in addition to the above fines, forfeit to the United States a sum of money three times the amount of money so received or accepted, and three times the value of any other consideration so received or accepted, to be ascertained by the trial court, for a period of six years prior to the commencement of the action, and the amount recovered shall be three times the total amount of money, or three times the value of such consideration so received or accepted, or both, as the case may be, during said six years, provided that the last penalties shall not apply to rebates or considerations received prior to the passage and approval of this Act.

But that is not all:

Under the old law, no suits could be commenced except upon recommendation of the Interstate Commission, or by the Attorney General of the United States, in his discretion. But the new law provides that the Attorney General of the United States is *"authorized and directed whenever he has reasonable grounds to believe that any such person or corporation has knowingly and wilfully received or accepted from any such railroad company any such sum of money, or other val-*

uable consideration, as a rebate or offset aforesaid, to institute in any court of the United States a civil action to collect the sum of money so forfeited as aforesaid."

That is to say: If any enemy of a shipper, say, a discharged employe, shall file with the Attorney General evidence sufficient to be reasonable grounds, the Attorney General has no discretion, because he is both authorized and *directed* by the law to commence suit against such shipper to recover three times the amount of rebates which he has received during the preceding six years.

Under the provisions of this law, if we were disposed to disregard our moral obligations as good citizens, it seems to me that from the business point of view neither the railway company nor the shipper can afford to continue these practices.

Accordingly I have directed the traffic department of the Chicago Great Western Railway Company to change the form of its tariffs, and instead of publishing rates from which 1¼ cents per cwt. is to be paid back to certain shippers, and not to others, to publish the net rate which it will charge and keep. There will be nothing returned on business after the new tariff goes into effect. These net rates will be the present rates, less the 1¼ cents per cwt., so the actual rates will be the same as before, and the rate will be the same for Peavey & Co., and for the Trans-Mississippi Grain Company who receive 1¼ cents per cwt. rebate, as to everybody else. This is the law, and the law must be obeyed.

Whether the other lines will publish their tariffs in the same way as the Chicago Great Western I am not informed, but the decision of the court in the Packers' cases, which have just been decided, is a warning to shippers that they must know whether or not the tariffs or arrangements under which they make shipments are legal or illegal. The shippers cannot excuse themselves by assuming that the tariffs made by the railway companies are legal.

The present custom of collecting certain tariff rates for the

transfer of grain, and afterwards paying back 1¼ cents per cwt. as an "elevation," "transfer," "loading" or "unloading" charge, had its origin with a contract made by the Union Pacific Railroad Company with Peavey & Co. in 1899, which became effective sometime during the year 1900, when Peavey's elevator at Council Bluffs was completed, whereby the Union Pacific Company agreed to pay to Peavey & Co. a so-called transfer charge of 1¼ cents per cwt. for all grain shipped over the Union Pacific lines which was unloaded into the Peavey elevator. This contract was a secret contract, the transfer charge not being mentioned in the published tariffs of the Union Pacific road, and made good to the whole shipping public, and it was sometime—I cannot tell how long—before the secret leaked out, and the Union Pacific Company has never to this date made it public by publishing the transfer charge allowed Peavey & Co. in their tariffs and giving the same allowance for unloading to the whole shipping public. Similar contracts were made with the Trans-Mississippi Grain Company at Council Bluffs, and with a Peavey elevator at Kansas City.

Sometime, probably in 1904, the Atchison, Topeka & Sante Fe Railway Company made an informal complaint to the Interstate Commerce Commission, on which the Interstate Commission summoned the Union Pacific Railroad and Peavey & Co. to show cause why the contract should not be set aside, and the Commission on the partial statement of facts which was presented to them found that the contract was legal, and that the payments made thereunder by the Union Pacific were legal.

Thereupon, the Chicago & Northwestern Company, the Chicago, Burlington & Quincy Company, the Missouri Pacific Company, the Atchison, Topeka & Sante Fe Company and the Chicago Rock Island & Pacific Company, having lines in Nebraska and Kansas parallel and competing with the Union Pacific lines, felt compelled to meet the rates thus made by the Union Pacific Company by secretly paying 1¼ cents per cwt.

to the large shippers of grain upon their lines. But as all of these companies had lines extending east and south from Missouri River points, and were desirous of preventing their grain from stopping at the markets of Omaha and Kansas City, they refused to pay 1¼ cents per cwt. out of their rate between the grain fields and the market towns of Omaha and Kansas City, but paid the allowance out of their through rates from the grain fields to Chicago, St. Louis and the Gulf ports.

Under this arrangement it is evident that all grain which stopped at the market towns of Omaha and Kansas City was handicapped to the extent of 1¼ cents per cwt. in respect to rates—a handicap which, if continued, it is evident would have ultimately destroyed the grain markets at Omaha and Kansas City.

Under these conditions, in order to protect the grain markets of Omaha and Kansas City, and to secure a fair share of the transportation of grain from Missouri River points to Chicago and Minneapolis and other points, the Chicago Great Western Company, which has no lines west of the Missouri River, felt compelled both in the interest of justice to the grain dealers and the markets at Omaha and Kansas City, and in their own interest, to make a similar allowance on shipments between these points and more eastern markets reached by its lines upon all grain which had not received such allowances, like the Peavey grain, between the grain fields and Omaha and Kansas City.

But the Chicago Great Western road has never paid these allowances secretly. From the outstart they published tariffs which they filed with the Interstate Commerce Commission stating the allowance which would be made in the shipment of such grain. The Chicago Great Western having taken this stand, and published these tariffs, compelled all the other lines to do the same, and thus the markets at Omaha and Kansas City have been maintained.

Now, let us see by a concrete example how the Peavey

contract would have affected the market at Omaha if the same allowance had not been made by the other lines.

A large grain dealing concern in Omaha informs me that during the past year they have bought on the Union Pacific Railroad and shipped in to Omaha more than one thousand carloads of grain, upon which the Union Pacific refused to make the same allowance which they made to Peavey & Co. and the Trans-Mississippi Grain Company. Estimating each carload at sixty thousand pounds, these thousand carloads of grain cost this company in Omaha $7.50 per car, or an aggregate of $7,500 more than a thousand carloads of grain would cost Peavey & Co. or the Trans-Mississippi Grain Company in Omaha.

I am further informed that the same concern, during the past year, has purchased and shipped into Omaha on all the lines, including the Union Pacific, about twelve thousand carloads of grain, upon which they have received no allowance by any of the roads bringing such grain into Omaha. Therefore, estimating each carload at sixty thousand pounds, these twelve thousand carloads of grain have cost this company in Omaha $90,000 more than a like quantity of grain would have cost Peavey & Co. and the Trans-Mississippi Grain Company in Omaha.

But there is still another clause in the Peavey contract which is a gross discrimination in favor of Peavey & Co. and the Trans-Mississippi Grain Company as against all other grain dealers and elevator companies doing business in Omaha.

The sixth section of the contract reads as follows:

"Railroad Company agrees to provide said Peavey & Co. for said elevator, equal privileges and advantages as it may grant to the proprietors of any other grain elevator or elevators that are now, or which may hereafter be, located on or served by said Railroad Company, at Omaha, Nebr., or Council Bluffs, Iowa, and that all cars coming from or going to any point or points on said railroad, to or from said elevator, and not less than ten miles from Omaha, shall

be switched, whether loaded or empty, to or from said elevator free of charge."

Hence, these two elevator companies are entitled to have grain arriving at Omaha on the Chicago, Burlington & Quincy, the Chicago & North Western, the Chicago Rock Island & Pacific, the Missouri Pacific, the Chicago, St. Paul, Minneapolis & Omaha railways, as well as the Union Pacific, switched to their elevators in Council Bluffs for nothing, and switched from their elevators to any outgoing line for nothing, while the other nine elevators in Omaha and Council Bluffs are compelled to pay, in order to get such grain to their elevators, from $2 to $6 per car, and the same amounts for getting their grain switched from their elevators to the outgoing lines, a discrimination in favor of the two favored elevators of from $4.00 to $12.00 per car, amounting in the aggregate on the twelve thousand cars in our example to nearly as much as the 1¼ cents per cwt. allowed in the previous section of the contract, which we have been considering.

This, also, is a secret arrangement not disclosed by any of the tariffs published by the Union Pacific Company, either at the time the contract was made, or since, and on the business of twelve thousand carloads handled by the concern which has been before mentioned would probably amount to nearly another $90,000 per annum.

Such are the enormous advantages which this contract secures to the Peavey Co. and the Trans-Mississippi Company over all other elevators and grain dealers in Omaha. Is this a square deal?

From this concrete example, it is evident that the grain company which has been referred to could not have brought twelve thousand cars of grain, or any considerable number of cars of grain, into Omaha in competition with Peavey & Co. and the Trans-Mississippi Grain Company, unless the roads taking such grain out would make the same allowance from their freight rates that Peavey & Co. and the Trans-Mississippi

Grain Company received on the grain in, and it is also evident that such allowance on its outshipments would be useless in the matter of equality between elevators and dealers if the same allowances on outshipments were made to Peavey & Co. and the Trans-Mississippi Grain Company.

Hence, however illegal these tariffs may have been in refusing to ship out grain for Peavey & Co. and the Trans-Mississippi Grain Company at the same time that grain could be shipped out for other concerns in Omaha who did not receive such allowance on their grain into Omaha, there seems to be an element of justice and fair dealing in such tariffs.

The prime purpose of the Interstate Commerce Law was to prevent one shipper deriving such an advantage over other shippers as the Peavey contract gives to Peavey & Co. and the Trans-Mississippi Grain Company.

"It cannot be challenged," says the United States Supreme Court in the Chesapeake & Ohio-New Haven coal case, "that the great purpose of the act to regulate commerce, while seeking to prevent unjust and unreasonable rates, was to destroy favoritism by requiring the publication of tariffs, and prohibiting secret departure from such tariffs, and forbidding rebates preferances and all other forms of undue discrimination. To this extent and for this purpose the statute was remedial, and is therefore entitled to receive that interpretation which reasonably accomplishes the great public purpose for which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject, as to such commerce, to the command of the statute and may not set its provisions at naught, cannot in reason be denied."

At the time the Peavey contract was made the Union Pacific Railroad had published tariffs of grain rates between all stations on its lines and Council Bluffs. The rates published in these tariffs did not cover the loading of grain into cars, or

the unloading of grain when it reached its destination at Council Bluffs, but, on the contrary, it expressly provided that grain in carloads should be loaded and unloaded by the shipper. Besides, this general schedule of rates, at the time the contract was made the Union Pacific company had also a published schedule of rates for switching grain between Omaha and Council Bluffs of $6.00 per car, which schedule is still in force, as to all shippers except Peavey & Co. and the Trans-Mississippi Grain Company. The law provided that after publishing such schedules of rates, it was unlawful for the Union Pacific Railroad to charge, demand, collect or receive from any person or persons a greater or *less* compensation for the transportation of grain than is specified in such published schedules of rates, and that, if the said Union Pacific railroad, directly or indirectly, by any *special rate, rebate, drawback or other device,* charged or collected from any person or persons a greater or less compensation for such services, the Union Pacific Railroad Company should be deemed guilty of unjust discrimination, which the law prohibits and declares to be unlawful.

In the face of these published schedules, and in the face of the provisions of the law, the Union Pacific Railroad Company entered into this secret contract with Peavey & Co. and the Trans-Mississippi Grain Company to make them alone an allowance of 1¼ cents per cwt. on all grain shipped to their elevators, and to switch grain for them only, between Omaha and Council Bluffs free.

Thus were the plain and fundamental provisions of the Interstate Commerce Law set at naught by the making of this contract. It is a contract to do an unlawful act. It is a contract which licenses robbery of the many for the benefit of the few, and is therefore unlawful.

It is true that the contract attempts to avoid the provisions of the law by calling the refunding of 1¼ cents a cwt. not —quoting the language of the law—"a special rate, or a re-

bate, drawback or other device," but the contract called it a "transfer charge," as though "a rose by some other name would not smell as sweet."

An inspection of this contract conclusively shows the greatest care in the selection of words, in order to disguise the real nature of the allowance which the contract made in transportation rates, but no attempt was made to disguise the discrimination in respect to switching charges.

Peavey & Co. agreed to build an elevator of 1,500,000 bushels. Peavey & Co. agreed to receive, not from the public, but from the railroad company, any grain tendered by it which originated on the lines of its railroad, and which may be consigned to or in the care of the elevator, to the capacity thereof, and to promptly transfer such grain from said railroad company's cars through said elevator, so that such business tendered to said elevator by said railroad company shall be first transferred and the cars of said railroad company promptly released. For this transfer the railroad company agrees to pay 1¼ cents per cwt. The transfer charge, by the terms of said contract, is payable on all grain originating on the lines of the Union Pacific Railroad Company and transported thereover which may be consigned to or in care of the said elevator. Whose grain but Peavey's will ever be consigned to or in the care of Peavey's elevator?

All terminal elevators transfer the grain which is delivered to them by the railroads through their elevator in the same way that Peavey contracted to transfer this grain through his elevator. The transferring of grain through an elevator consists of unloading it from the cars, storing it in the elevator, and when shipped forward, loading it from the elevator into the outgoing cars. Nowhere in this contract does Peavey & Co. agree to perform any service for the Union Pacific Railroad Company which it was not obliged to perform under the terms of its published tariffs, and which all other receivers of grain at Omaha or Council Bluffs are obliged to perform at

their own expense under such tariffs, without compensation from the railroad company, viz: unload its own grain into its own elevator.

As a matter of fact, Peavey & Co. has never, since the existence of this contract, done anything more than unload its own grain into its own elevator, and, after sorting and mixing and manipulating the grades, ship it out to suit their own convenience and profit.

For the Union Pacific Railroad Company or Peavey & Co. to claim that the payment of 1¼ cents per cwt. to Peavey & Co. for services which it was their duty to perform without payment, is an extremely thin disguise of a rebate.

Peavey & Co. will probably claim that they would not have built an elevator without the agreement on the part of the Union Pacific to pay this rebate, and the Union Pacific Company claims that the concentration of a large amount of business in the hands of Peavey & Co., by means of this rebate, which would be unloaded promptly into the elevator, is of great advantage to it in releasing their cars.

If we admit both of these propositions to be true, *it is no excuse for the disobedience of the fundamental principles of the law.* There never was an unlawful rebate paid by any railway company which both the giver and the receiver did not consider for their mutual advantage.

The Union Pacific Company also claims that an elevator at Council Bluffs, where its grain could be unloaded promptly and its cars released, is of advantage to the shipping public. This same advantage, if it is an advantage could have been secured by the Union Pacific Company building and operating its own elevator. Hence, the interests of the public are not conserved with this unlawful contract.

But it is claimed that this contract, and the practices under it, have been submitted to the Interstate Commerce Commission and by them approved.

I deny this proposition!

It is true that this matter has been before the Interstate Commerce Commission, and the Commission has given the opinion that the facts disclosed at the hearing, "however objectionable the arrangement in question may appear from any point of view, it cannot be adjudged unlawful."

The facts as presented to the Commission, and upon which its decision was based, seemed to prove that the elevator was built and operated principally for the purpose of transferring grain which was consigned to points beyond the terminus of the Union Pacific lines from the cars of the Union Pacific Company directly to the outgoing cars of the connecting carriers for further transportation, thus releasing the Union Pacific cars more promptly and more cheaply than by any other means of transfer. It was not pointed out to the Commission that under the customs of railroading it was not the duty of the Union Pacific in through shipments to make such transfer, but that custom required the connecting carriers to make the transfer.

The apparent opponents of the contract admitted the legal rights of the parties to make such a contract, provided the transfer charge was reasonable. No one pointed out to the Commission the terms of the railroad schedule of rates, which required Peavey & Co. and all other receivers of grain to unload and transfer their own grain without payment from the railway company, and the sole question submitted and decided by the Commission was, in effect:

Granting the right and the duty of the railroad company to pay for such a transfer, was the charge of 1¼ cents per cwt. a reasonable charge. The decision of the Commission was that under such a statement of facts the amount of the charge, on the evidence produced, was not unreasonable. And that is all the decision does decide.

This is the legal status of the contract today. It is of the first importance to all grain shippers and all grain carrying

railways, and especially to the grain market at Omaha, that the Interstate Commerce Commission reopens the case and hears further testimony and argument, and I am convinced that the result will be that they will hold the Peavey contract and the practices under the Peavey contract to be illegal. It is my purpose to make a petition for the re-argument of the case at an early date. If the Grain Exchange of Omaha, or any of its members, desires to join in such application I would be very glad to have them join.

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